A

LAU CHOO SENG

v.

CHONG WEI KEE & ANOR

B HIGH COURT MALAYA, KUALA LUMPUR
HANIPAH FARIKULLAH JC
[SUIT NO: D3-22-1256-2004]
6 OCTOBER 2010

C ***TORT:*** *Negligence - Professional negligence - Whether second defendant law firm negligent as stakeholder - Sale and purchase agreement for shares - Whether second defendant duty-bound to release share certificates and transfer forms to purchaser only after full purchase price paid - Whether purchaser able to prove full purchase price paid - Whether purchaser's suit* D *barred by limitation and laches - Whether there was duplicity of proceedings*

LIMITATION: *Action - Damages - Claim for - Whether time barred - Plaintiff took six years to initiate action - Whether plaintiff estopped* E *and barred by laches from asserting his rights - Limitation Act 1953, s. 6(1)(a)*

The plaintiff engaged the second defendant law firm to advise and prepare the necessary documentation for the purchase by him of 38,000 ordinary shares owned by the first defendant in a F company ('the company'). The purchase price for the shares was RM400,000. Under the sale and purchase agreement for the shares ('the agreement') which the parties executed, upon its signing and simultaneous payment by the plaintiff of half the purchase price, the first defendant was required to deposit the G original share certificates and share transfer forms with the second defendant as stakeholders. Upon full payment of the purchase price by the plaintiff and the listing of the company on the KLSE (Second Board), the second defendant was, *inter alia*, required to release the share certificates and transfer forms to the plaintiff. If H the company failed to be so listed, the plaintiff still had the option to continue with the agreement for the purchase of the shares. The listing did not take place and the plaintiff opted to continue with the agreement. The plaintiff later claimed it had paid the full purchase price to the first defendant but the second defendant I failed to release to the plaintiff the original share certificates and transfer forms. The plaintiff sued the second defendant for negligence and for breach of agreement to advise. The plaintiff

claimed damages with interest saying that due to the second defendant's defaults and omissions, it was neither able to complete the purchase of the shares nor get back the RM400,000 it had allegedly paid to the first defendant because the latter had become bankrupt.

The particulars of the second defendant's negligence were that it had failed to (i) request the first defendant to deposit the original share certificates and transfer forms with them as stakeholders upon the first payment of RM200,000 (ii) release the share certificates and transfer forms to the plaintiff upon payment of the full purchase price (iii) inform the plaintiff of the progress of the transaction under the agreement and (iv) advise the plaintiff on the next course of action to take after the plaintiff opted to continue with the agreement despite the non-listing of the company. The second defendant, however, submitted the plaintiff had failed to prove its case, that the plaintiff himself had breached the agreement by not paying the full purchase price, that the plaintiff's claim was statute-barred and that the suit was not maintainable for laches.

Held (dismissing the claim with costs):

(1) No evidence was tendered to show the purchase price of RM400,000 had been paid to the first defendant. The plaintiff also failed to produce the first defendant to testify that the full purchase price had been paid to him. The plaintiff's claim that he had paid the full purchase price was a bare allegation. (paras 36, 37 & 39)

(2) The only document tendered by the plaintiff to support his allegation that the purchase price had been paid was a copy of a cheque with the amount of RM200,000 payable to the first defendant. This was insufficient to prove the plaintiff had complied with the terms of the agreement. (para 36)

(3) As stakeholder, the second defendant's duty to release the share certificates and transfer forms to the plaintiff only arose once the plaintiff had made full payment of the purchase price to the first defendant. (para 35)

(4) The earliest time the plaintiff could have commenced the suit was after the second defendant's letter dated 28 August 1998 to the first defendant requesting him to do the necessary to facilitate the transfer of the shares to the plaintiff. The limitation period commenced from the date of that letter. The plaintiff's claim was barred by limitation. (para 45)

(5) The plaintiff was also barred by laches from asserting his right to the transfer of shares. The plaintiff took six years to initiate action against the defendants. No explanation was given to justify the long delay in claiming relief. The plaintiff was estopped and barred by laches from claiming against the second defendant. (paras 46 & 47)

(6) The doctrine of duplicity of proceedings did not apply. Here was not a case where the plaintiff had previously commenced a suit against the second defendant and then re-filed the claim against them. (para 53)

Case(s) referred to:

Alfred Templeton & Ors v. Mount Pleasure Corp Sdn Bhd [1989] 1 CLJ 693; [1989] 1 CLJ (Rep) 219 HC ***(refd)***

Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Benjamin Wong Peng Yan v. Genting Bhd & Anor [1994] 1 CLJ 351 HC ***(refd)***

CIMB Bank Berhad v. Tan Kim Leong Holdings Sdn Bhd & Ors [2010] 1 LNS 104 HC ***(refd)***

Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(refd)***

Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 4 CLJ 1 CA ***(refd)***

Mayban Allied Bhd v. Kenneth Godfrey Gomez & Anor And Another Appeal [2010] 9 CLJ 702 CA ***(refd)***

Miller (t/a Waterloo Plant) v. Cawley [2002] EWCA Civ 1100 ***(refd)***

Nik Che Kok v. Public Bank Bhd [2001] 2 CLJ 157 CA ***(refd)***

Subry Hamid v. Husaini Tan Sri Ikhwan & Anor [2006] 4 CLJ 50 CA ***(refd)***

Trustees Of Leong San Tong Khoo Kongsi (Penang) Registered & Anor v. Lee Boon Tin [1998] 4 CLJ 368 CA ***(refd)***

Utama Merchant Bank Bhd v. Dato' Mohd Nadzmi Mohd Salleh [2003] 4 CLJ 859 HC ***(refd)***

Legislation referred to:
Limitation Act 1953, s. 6(1)(a)

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 28, paras 820, 847

For the plaintiff - Wallace Wong Hur Shiaw; M/s Chiong & Walliace Wong
For the defendants - Vignesh Kumar Krishnasamy; M/s Balendran Chong

Reported by Ashok Kumar

JUDGMENT

Hanipah Farikullah JC:

[1] The plaintiff claims against the second defendant for the sum of RM400,000 with interest at the rate of 8% per annum from the date of filing of this action. The plaintiff's claim is based on negligence and breach of agreement by the second defendant to advise the plaintiff on the sale and purchase agreement ("the agreement") dated 20 March 1996 between the plaintiff and the first defendant, resulting in losses of RM400,000 to the plaintiff.

[2] The plaintiff's claim is disputed by the defendant. The defendant pleads that there has been no act of negligence committed by the second defendant or breach of agreement to advise as the plaintiff himself has failed to comply with the terms of the agreement.

Background Facts

[3] The first defendant is the owner of 38,000 shares in the share capital of one company called Quality Coat Sdn Bhd ("the company").

[4] On or about February 1996, the first defendant agreed to sell and the plaintiff agreed to purchase that 38,000 ordinary shares of RM1 each representing 4% of the issued and paid-up capital in the company.

[5] The plaintiff engaged the second defendant, a law firm, to advise and prepare the necessary documents to facilitate and complete the said sale.

[6] On 6 February 1996, the second defendant issued the plaintiff an invoice no. 0054 (marked as exh. "P6" at p. 13 of bundle B), charging the plaintiff a sum of RM1,622 for the following work:

Particulars

Quality Coat Sdn Bhd

Being our Professional charges for the above matter including preparing the following Agreements and attending to the execution of the abovementioned Agreement, by all parties, stamping, follow-up work in relation to the foregoing, telephone attendances and calls and other attendances not specifically mentioned herein:

(1) Sale and Purchase Agreement between Chong Wei Kee and your goodself;

(2) Power of Attorney by Chong Wei Kee to Lau Choo Seng.

Disbursement

Stamping; Sale and Agreement

A set of Power of Attorney

Registration Fee of Power of Attorney

Printing Charges and Binding Charges

Telephone, Postage charges, Courier and Fax Charges

Transportation/Delivery

Miscellaneous ...

[7] On 12 February 1996, the plaintiff made full payment of RM1,622 (exh. "P7" at p. 14 of bundle B) to the second defendant, in respect of the said invoice in exh. P6.

[8] Subsequently, the second defendant prepared the following documents:

i. the sale and purchase agreement of shares between the plaintiff and the first defendant (the agreement) (exh. "P1" at p. 1-12 of bundle B); and

ii. the power of attorney, to be executed by the plaintiff and the first defendant.

[9] The agreement between the plaintiff and the first defendant was executed on 20 March 1996 in the presence of the second defendant's partner, one Miss Sim Tze Chui.

1. Amongst the salient terms of the agreement are as follows:

(a) the consideration for the shares is RM400,000.

(b) Upon execution of the agreement, and simultaneous with the plaintiff's payment of first RM200,00, the first defendant shall deposit with the second defendant the original shares certificates for share transfer as the stakeholder for those documents (cl. 2.1(a) of the agreement).

(c) upon full payment of the purchase price for the shares:

(i) the first defendant shall continue to hold the shares as nominee and for plaintiff's benefit upon trust to plaintiff and/or his heirs, personal representative(s) and estate (cl. 4.1(1) of the agreement); and

(ii) the second defendant shall either release the share certificates to the purchaser and release the share transfer forms to the purchaser upon the listing of the company on the KLSE (second board) or if the company fails to be listed, upon the parties hereto agreeing to nevertheless continue with this agreement or to return the shares transfer documents to the first defendant in the event and upon the termination of this agreement." (Clause 2.1(a)(i), (ii) and (iii) of the agreement)

(d) the sale and purchase agreement of the shares was also conditional upon procurement of the company, of written approvals and consents of governmental and/or regulatory authorities for the listing of the company on the second Board of the then Kuala Lumpur Stock Exchange.

(e) In the event such approvals or consents are not obtained within a period of 12 months from the date of the agreement:

(i) the first defendant and the plaintiff shall be entitled to terminate the agreement; or

(ii) The plaintiff shall have the right to nevertheless continue with the agreement and purchase the shares in the company.

[10] A year later, the company could not procure the approval and consent of governmental authorities for listing purposes. By way of a letter dated 17 March 1997 (exh. "P2" at p. 15 of bundle B) the plaintiff opted to continue with the agreement.

The Plaintiff's Case

[11] The plaintiff, Lau Choo Seng (PW1) testified that on 20 March 1996 the plaintiff entered into a sale and purchase agreement with the defendant. The agreement was prepared and witnessed by the second defendant. PW1 referred the court to the invoice in exh. "P6" (p. 1-2 of bundle B) which sets out a client-solicitors relationship when the plaintiff was invoiced by the second defendant. The plaintiff paid the full amount required in the invoice in exh. "P7". According to PW1, the scope of the second defendant's duty was clearly spelled out as including preparing the agreement, attending the execution of the agreement and follow up work with regards to the share purchase transaction under the agreement.

[12] With regards to the purchase price of the shares, PW1 said that the second defendant was fully aware of RM400,000 being paid by the plaintiff to the first defendant. According to PW1, *vide* a letter dated 28 August 1998 (exh. "P4" at p. 16 of bundle B), the second defendant states that:

> We understand from the Purchaser that you have at his request agreed to transfer or cause the transfer of shares from yourselves_and/or your nominee or nominees to the Purchaser pursuant to clause 4.1(i) of the Agreement.

[13] Reference was made by PW1 to cl. 4.1(i) of the agreement which states as follows:

> At the request of the Purchaser, the Vendor hereby agrees that upon full payment of the Purchase Price for the Shares the Vendor shall continue to hold the Shares in the Vendor's names as nominee and for the benefit of the Purchaser until at least such time when the Company shall have been listed onto the KLSE (Second Board) and unless otherwise instructed by the Purchaser and the Shares shall have been transferred to the Purchaser ...

[14] It is the plaintiff's position that the defendant was aware that the full payment of the purchase price of RM400,000 (the purchase price) was paid by the plaintiff to the defendant. Otherwise, the second defendant, being the solicitor who prepares the agreement, would not have made reference to cl. 4.1(i) of the agreement in exh. P4. However PW1 testified that the second defendant did not follow up on the transaction and failed to advise the plaintiff on the needful action. As the result, the plaintiff now could not have the transfer of that 4% of shares in the company, and also could not recover the RM400,000 paid, now that the first defendant was made a bankrupt.

[15] Further, PW1 gave evidence to the court that the second defendant act of negligence are as follows:

(a) Pursuant to 2.1(a) of the agreement, the second defendant should have inquired from the first defendant to deposit the original share certificates with them as stakeholders to the share transfer forms upon the first payment of RM200,000 (as in exh. "P3" at p. 24 of bundle B) by the plaintiff. The second defendant did not do so.

(b) Upon the full purchase price made for the purchase of shares, coupled with the plaintiff's opting to continue with the agreement despite the non-listing of the said company on KLSE (second board), cl. 2.1(a)(i) and (ii) of the agreement provides that the second defendant shall release the shares certificates and the share transfer forms to the plaintiff and the second defendant did not follow up on that thus not comply with the said clause.

(c) The third paragraph in the second defendant's letter dated 28 August 1998 itself (exh. "P4" at p. 16 of bundle B) also suggest that the plaintiff was supposed to be informed of the progress of the transaction, but nothing of that sort was done by the second defendant.

(d) The second defendant had received on 18 March 1997 the plaintiff's letter dated 17 March 1997 to both the first defendant and the second defendant, electing to opt to continue with the agreement despite the non-listing of the said company (exh. "P2" at p. 15 of bundle B). yet there is nothing to show the second defendant further advised the plaintiff for the next course of action.

[16] PW1 informed the court that because of the second defendant's negligence or failure to comply with the terms of the agreement, the plaintiff now could not reclaimed the sum of RM400,000 paid to the first defendant upon his bankruptcy.

[17] During cross-examination, PW1 was queried as to whether he had paid the purchase price of RM400,000 in full. In this regard, PW1 agreed that the evidence tendered to the court only shows the cheque being issued to the first defendant for RM200,000 only. Further, in cross-examination PW1 agreed that upon payment of RM200,000 by the plaintiff, the first defendant did not deposit with second defendant the original share certificates and the share transfer form to the second defendant.

The Defendant's Case

[18] From the very outset, the court was informed by learned counsel for the second defendant that no witness would be giving evidence in court for the second defendant. At the close of the plaintiff's case, learned counsel for the defendant informed the court that he was closing his case and will be submitting in his written submission.

[19] Learned counsel for the second defendant in his written submission raised the following issues:

(a) The plaintiff has failed to discharge his burden in proving his case. This is because there has been no act of negligence or breach of the agreement was committed by the second defendant in the first place as the plaintiff himself has failed to comply with the terms of the agreement.

(b) The plaintiff's claim is statute barred by virtue of s. 6(1) of the Limitation Act 1953.

(c) Doctrine of laches is applicable due to plaintiff's delay in filing the claim against the defendants.

(d) The plaintiff's claim against the second defendant constitutes "Duplicity of Proceedings".

Issue

[20] Based on the pleadings and evidence adduced, the main issue to be determined by the court is whether the second defendant is negligence or is in breach of the agreement in failing to advise the plaintiff on the transfer of shares transaction under the agreement resulting in losses of RM400,000 to the plaintiff.

[21] In coming to a decision in this case, the court has carefully considered the evidence adduced by the plaintiff's and the documentary evidence tendered in support of his case as well as the written submissions submitted to court.

Effect Of The Defendant Not Calling Witness

[22] At the outset let me say that where a defendant calls no evidence, it does not automatically follow that a plaintiff will succeed in its claims. The Federal Court in the case of *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509 had occasion to deal with the effect of the defendant making an election not to call any evidence at the close of the plaintiff's case.

[23] In the case of *Jaafar Shaari (supra)*, the appellants were personal representatives of the deceased who was killed in a collision involving a motorcycle owned by the second respondent and ridden by the first respondent. The first respondent lodged a police report shortly after the accident. However, there was a letter from the respondents' solicitors informing that: "We suggest that the police report be tendered through its maker dispensing with formal proof". At the trial, the only witness called by the appellants was the investigating officer who explained the sketch plan that he had prepared. At the close of the appellants' case, counsel for the respondents informed the court that the first respondent was not available to give evidence as he was out of the country. He then said that he was closing his case. The Sessions Court held that the police report was not admissible and dismissed the action on the ground that there was no evidence to support the allegation of negligence made by the appellants. The appellants' appeal to the High Court was dismissed and a further appeal was made to the Supreme Court.

[24] His Lordship Peh Swee Chin FCJ (as he then was) in the case of *Jaafar Shaari* held as follows:

> In the instant case, there was no intention expressed about making a submission of no case to answer, therefore there was no need for the trial court to put the defence to such election. Any such perceived intention was in fact very clearly contradicted by the defence referring to O. 28 r. 16(3) aforesaid applicable to the normal order of speeches in the Sessions Court. The defendants had however chosen to close the case at the end of the plaintiff's case, they were entitled to do so through they would be in peril of not having the evidence of their most important witness and of having any adverse inference drawn against them for failing to call any such evidence should the circumstances appropriately call for such adverse inference ... .

[25] The Court of Appeal in the case of *Subry Hamid v. Husaini Tan Sri Ikhwan & Anor* [2006] 4 CLJ 50 His Lordship Gopal Sri Ram JCA held that the test to be applied in a case where a submission of no case is made is as set out in the case of *Miller (t/a Waterloo Plant) v. Cawley* [2002] EWCA Civ 1100 as follows:

> Where a defendant was put to his or he election and elected to call no evidence, the issue was not whether there was any real or reasonable prospect that the claimant's case might be made out or any case fit to go before a jury or judge of fact. Rather, it was the straightforward issue, arising in any trial after all the evidence had been called, namely whether or not the claimant had established his or her case by the evidence called on the balance of probabilities.
>
> (Emphasis added)

[26] Applying the authorities cited above, the court will examine the evidence of the plaintiff and the documentary evidence tendered to the court to see if the plaintiff has succeeded in making out a case against the second defendant on a balance of probabilities.

Agreed Facts

[27] It is an agreed fact that the plaintiff have entered into the agreement dated 20 March 1996 where the first defendant agreed to sell and the plaintiff agreed to purchase 38,000 ordinary shares of RM1 each representing 4% of the issued and paid-up capital in the company.

[28] The terms of the agreement includes the duty of the plaintiff to pay RM400,000 to the first defendant in consideration of the transfer of the shares and the listing of the company on the second board of the Kuala Lumpur Stock Exchange (hereinafter referred to as "KLSE"). A

[29] The second defendant, through the plaintiff's agent, has been appointed as the solicitors to prepare the agreement. B

[30] It is not in dispute between the plaintiff and the second defendant that the plaintiff has obtained a judgment in default of appearance against the first defendant on 20 September 2005 for a sum of RM400,000 being the refund of the purchase price of the shares and RM40,000 being the agreed damages payable by the first defendant. The first defendant has been adjudged a bankrupt. C D

[31] Having established the agreed facts, the next question that arise for determination by the court is whether the second defendant has committed negligence or has breached the terms of the agreement in failing to advise plaintiff in respect of the sale and purchase of the shares under the agreement. E

[32] Learned counsel for the plaintiff in his written submission contended that upon the full payment of purchase price made by the plaintiff for the purchase of the shares, coupled with the plaintiff's opting to continue with the agreement, despite the non-listing of the said company on KLSE (second board), cl. 2.1(a)(i) and (ii) of the agreement provides that the second defendant shall release the shares certificates and the share transfer forms to the plaintiff. The second defendant did not follow up on that and did not comply with the said clause. F G

[33] Further, it was argued by the plaintiff that the third paragraph in the second defendant's letter dated 28 August 1998 (exh. "P4" at p. 16 of bundle B) itself also suggest that the plaintiff was supposed to be informed of the progress of the transaction, but nothing of that sort was done by the second defendant. H

[34] The court has carefully perused the provisions of the agreement and finds that according to cl. 2.1(a) of the agreement, (exh. "P1") the duty of the second defendant only arises after the plaintiff has paid the first installment of RM200,000 to the first defendant, where, the second defendant shall either: I

A (i) Release the share certificate to the first defendant upon full settlement of the purchase price by the first defendant; and

(ii) Release the share transfer forms to the first defendant upon the listing of the company on the KLSE (second board) or if
B the company fails to be so listed, upon the parties hereto agreeing to nevertheless continue with this agreement;

(iii) Return the shares transfer documents to the plaintiff in the event and upon the termination of this agreement in accordance herewith.
C

[35] As such on this issue, I find that as a Stakeholder, the second defendant's duty only arises once the plaintiff comply to the terms of the agreement, that is upon the full payment of the purchase price by the plaintiff to the first defendant.
D

[36] In this present case, the court is in agreement with the submission of the defendant that the plaintiff has failed to prove that he had complied with the terms of the agreement, as no evidence was produced to substantiate his allegation. In this
E respect, no evidence has been tendered to support the plaintiff's allegation that the purchase of price of RM400,000 has been paid to the first defendant. The only document tendered by the plaintiff in relation to support the plaintiff's allegation that the purchase price has been paid is a copy a cheque with the amount of
F RM200,000 payable to the first defendant. This cheque however is insufficient to prove that the plaintiff has complied with the terms of the agreement. No documents or any evidence such as any bank statements or account books were tendered to prove that the full amount of the purchase price of RM400,000 has
G been released to the first defendant.

[37] As I could see it, one person who could have thrown light as to whether the plaintiff had paid the full purchase price of RM400,000 is the first defendant. In this present case, the plaintiff
H has failed to produce the first defendant to give evidence in support of his allegation that the full purchase price has been paid to the first defendant.

I

[38] In the case of *Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 4 CLJ 1 which was followed by the courts in the case of *Utama Merchant Bank Bhd v. Dato' Mohd Nadzmi Mohd Salleh* [2003] 4 CLJ 859 and in *CIMB Bank Berhad v. Tan Kim Leong Holdings Sdn Bhd & Ors* [2010] 1 LNS 104; [2010] 3 AMR 194, the Court of Appeal held as follows:

> He who alleges must prove such allegation and the onus is on the appellant to do so. See section 103 of the Act. Thus, it is incumbent upon the appellant to produce Tan Sri Bashir as his witness to prove the allegation. The fact that the appellant was unable to secure the attendance of Tan Sri Bashir as a witness does not shift the burden to the respondent to produce the witness and testify as to what he had uttered ...

[39] The plaintiff, being a chartered accountant is a well-educated person. If there was to be any payment of such a large amount made to the first defendant, surely the first defendant would have kept any bank statements or bank accounts for his safekeeping in proving that such transaction has taken place. Thus, the plaintiff's claims that he had paid the full purchase price constitutes a bare allegation. As such, on this issue alone the court finds that the plaintiff has failed to make out its case against the second defendant on the balance of probabilities.

[40] However, if this court is wrong in dismissing the plaintiff's claim with costs on the above issues, I now proceed to consider several other material issues raised before the court in the written submissions of counsel for the second defendant.

The Plaintiff's Claim Is Statue Barred Under s. 6(1) Of The Limitation Act 1953 And The Doctrine Of Laches

[41] Learned counsel for the defendant submitted that applying s. 6(1) of the Limitation Act 1953 to the case before this court, the action initiated by the plaintiff against the first and second defendant is barred by statute because the plaintiff's only filed the claim against the defendant six years after the cause of action has accrued.

[42] The issue before the court is when did time begin to run for the purpose of s. 6(1)(a) of the Limitation Act 1953. It is clear that no action founded on a contract or negligence should be brought after the expiration of six years from the date or which the case of action accrued. Therefore in the circumstances of this case when did the cause of action accrue?.

[43] It is the contention of the learned counsel for the second defendant that the cause of action accrued when the second defendant sent a letter dated 28 August 1998 to the first defendant (exh. P4 at p. 16 of the bundle of documents). Therefore, as the present suit was filed on 27 August 2004, it is time barred pursuant to s. 6(1)(a) of the Limitation Act 1953. Learned counsel for the plaintiff on the other hand submitted that the breach has to be computed after 28 August 1998 and not from 28 August 1998.

[44] It is settled law that for the purpose of the Limitation Act 1953, the cause of action against the second defendant arose from the date the cause of action accrued. (See *Mayban Allied Bhd v. Kenneth Godfrey Gomez & Anor And Another Appeal* [2010] 9 CLJ 702). Where the defendant has pleaded that the action is time-barred, the burden is on the plaintiff to prove that the relevant limitation has not expired (see: *Halsbury's Laws of England* 4th edn, Vol. 28, para 820 and 847; *Mayban Allied Bhd v. Kenneth Godfrey Gomez & Anor & Another Appeal (supra)*).

[45] In the case of *Nik Che Kok v. Public Bank Bhd* [2001] 2 CLJ 157, the Court of Appeal held that time began to run from the earliest time at which the creditor could have brought an action. In the present case, the court finds that the earliest time the plaintiff could have commenced the suit was after the letter dated 28 July 1998 (P4) was issued by the second defendant to the first defendant requesting him to transfer the shares to the second defendant and further for the first defendant to instruct the company secretary of Quality Coat Sdn Bhd to prepare the necessary to effect the transfer of the shares to the plaintiff. Therefore, the limitation period commenced from the date of the letter which is 27 August 2004. Thus, the claim of the plaintiff in this suit was filed six years out of time and was barred by limitation.

[46] I agree with the learned counsel for the second defendant for his reasoning that the plaintiff is also barred by laches from asserting his right in the said transfer of shares as against the second defendant. In my judgment, the doctrine of laches is applicable as the plaintiff took six years to initiate an action against the defendants. No explanation was given by the plaintiff in his pleadings or written submission to justify the long delay in claiming for the reliefs against the defendants.

[47] The plaintiff in this case is a well educated person as the plaintiff is a chartered accountant where he is an intelligent, fully aware of his legal rights and most importantly he had legal advice on the matter. The plaintiff, even after the first defendant failed to transfer the shares to him and the fact that the plaintiff had the advantage of legal advice on the matter still did not commence any action against the second defendant. Thus, in my judgment after many years, the plaintiff is now estopped and barred by laches from claiming against the second defendant.

[48] In the case of *Alfred Templeton & Ors v. Mount Pleasure Corp Sdn Bhd* [1989] 1 CLJ 693; [1989] 1 CLJ (Rep) 219 at p. 276, it was held that:

> Laches is an equitable defence implying lapse of time and delay in prosecuting a claim. A court of equity refuses its aid to a stale demand where the plaintiff has slept upon his rights and acquiesced for a great length of time. He is then said to be barred by laches. In determining whether there has been such delay as to amount to laches the court considers whether there has been acquiescence on the plaintiff's part and any change of position that has occurred on the part of the defendant.

[49] In the case of *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Anor v. Lee Boon Tin* [1998] 4 CLJ 368, the Court of Appeal has allowed the appellant's appeal being the reason that the five years and nine months delay by the respondent in filing his action has prejudiced the appellant even though it was filed within the time stipulated by the Limitation Act 1953. Applying the decision given in the case of *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered (supra)*, the delay by the plaintiff in initiating the claim against the second defendant is prejudicial to the second defendant. In the present case, the second defendant is no longer in existence and has been dissolved almost five years ago.

Duplicity Of Proceedings

[50] Learned counsel for the second defendant contended that as the plaintiff has obtained judgment against the first defendant, the plaintiff's claim against the second defendant constitute duplicity of proceedings and is barred by the law. The defendant has referred to the Federal Court's decision of *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 and *Benjamin*

Wong Peng Yan v. Genting Bhd & Anor [1994] 1 CLJ 351. In this present case, it is an agreed fact that the plaintiff has obtained a judgment in default of appearance against the first defendant on 20 September 2005.

[51] The court has carefully perused the facts of these authorities to ascertain their relevance and true import. The court finds that in both the cases referred to by learned counsel for the defendant involve "re-litigation" of claims. In the case of *Asia Commerce Finance* case *(supra)*, the Federal Court was fully minded that the borrower had firstly filed an originating summons in High Court ("the first proceeding"), and when the first proceeding and its appeal were dismissed, the borrower further brought an action against the same party in the High Court for damages on the same ground as the first proceeding. In that case, the Federal Court was right in deciding that there was therefore duplicity of proceedings. The Federal Court held that:

> The borrower's case was a classical case for the application of the doctrine of *res judicata* by way of a cause of action estoppel. The causes of action of both the first proceeding and the present statement of claim were identical, as both claimed damages for failure of the finance company to allow the borrower to utilize in full the loan of RM750,000, causing loss consequent upon the failure of the housing development to be proceeded with further. All rights and liabilities of both parties had merged into the judgment of the first proceeding and the effect of a cause of action estoppel was absolute.

[52] In *Wong Peng Yan Benjamin (supra)*, Justice Abdul Malek (as he then was) was minded of one case re-litigated in the form of another new suit, though the issues were the same. The court in In *Wong Peng Yan Benjamin (supra)* held that:

> It cannot be argued that the relief is not the same in the originating motion, the originating summons and this action, as basically the plaintiff only wants to be re-registered as the proper owner and holder of the shares he had lost by CTH's fraud. This he had obtained in the originating motion. The prayers here may appear different by the ancillary claim for [*729] bonus shares, rights issue shares and dividends from 9 April 1984 but the basic relief is the same as in the originating motion and to my mind, the plaintiff cannot now be allowed to ask for ancillary prayers he had left out in his originating motion.

Relying on the facts of the matter, the principles of principal and agent, the sequence of the three causes of action, the reliefs claimed in each, the parties in each, and the authorities cited, both from textbooks and case law, I can only come to the conclusion that *res judicata* applies as the relief claimed in the originating motion is substantially the same as the relief claimed here. Since the relevant relief has already been obtained, it is also my view that this writ and statement of claim discloses no reasonable cause of action, is scandalous, frivolous and vexatious, and is a blatant abuse of the process of the court.

[53] However, the court finds that the doctrine of duplicity is not applicable in the instant case. Here is not a case where the plaintiff has previously commenced a suit against the second defendant and refilled the claim against them. The plaintiff is taking action against two parties together, and while judgment against the first defendant is not possible now that the first defendant is bankrupt, the plaintiff now is merely exercising his right to continue his action against the second defendant. Thus, the objection premised on duplicity is without merit.

Conclusion

[54] For the above reasons, the court finds that the plaintiff has failed to prove its case against the second defendant. Accordingly, the plaintiff's claim is hereby dismiss with costs.